

Analysis of the Number of LP1000 Stations
With 2nd- and 3rd- Adjacent Channel Protected and
Translators Protected and Not Protected

Above 500,000		
Translators Protected		
City	No	Yes
New York	0	0
Los Angeles	0	0
Chicago	0	0
Houston	0	0
Philadelphia	0	0
San Diego	0	0
Phoenix	0	0
Dallas	0	0
San Antonio	1	0
Detroit	0	0
San Jose	0	0
Indianapolis	0	0
San Francisco	0	0
Baltimore	0	0
Jacksonville	0	0
Columbus	2	1
Milwaukee	0	0
Washington	0	0
Boston	0	0
Nashville	0	0
Totals	3	1

Between 200,000 - 500,000		
Translators Protected		
City	No	Yes
Denver	0	0
Cleveland	0	0
Oklahoma City	0	0
Charlotte	0	0
Tucson	6	5
Albuquerque	0	0
Atlanta	1	0
Miami	0	0
Las Vegas	0	0
St. Louis	0	0
Cincinnati	0	0
Pittsburgh	0	0
Minneapolis	0	0
Omaha	1	0
Wichita	1	1
Louisville	1	0
Raleigh	0	0
Baton Rouge	0	0
Mobile	0	0
Richmond	3	3
Totals	13	9

Less Than 200,000		
Translators Protected		
City	No	Yes
Montgomery	2	1
Spokane	2	0
Des Moines	0	0
Grand Rapids	0	0
Orlando	0	0
Little Rock	0	0
Salt Lake City	0	0
Boise	0	0
Springfield	1	1
Kansas City	0	0
Peoria	1	1
Midland	1	1
Manchester, NH	0	0
Santa Barbara	2	1
Trenton	0	0
Harrisburg	0	0
Flagstaff	5	2
Manchester, CT	0	0
Greenville	2	1
La Crosse	1	1
Totals	17	9

The Commission may qualify its “Spectrum Availability Analysis” study as a rough estimate of the number of LPFM stations and argue it should not be relied on as definitive proof that LPFM allotments are possible and available. However, it is very clear that the Commission itself depends on the charts and computer program to prove that this entire exercise is not a waste of time.¹⁶⁰ The Commission states it must “make room” for LPFM;¹⁶¹ thus, the Commission had to determine whether any new service could be squeezed in at all.

As NAB has pointed out in these comments, the Commission must maintain second and third adjacent channel protections in order to ensure that interference will not occur to existing radio stations. With that established, the number of “available” LP1000 stations would drop substantially.¹⁶² If existing translators are protected, the numbers would be further reduced – almost to zero.

Existing translators must be protected in order to ensure that vital service is not interfered with, interrupted or eliminated. And, as noted earlier, the Commission cannot eliminate the existing protection criteria in order to protect existing stations from interference. Taking these two factors together, the result would assign only 19 LP1000 stations in the 60 markets. Thus, the Commission should not waste the resources needed to establish an LP1000 class.

¹⁶⁰ Notice Appendix D. The Commission opens its Spectrum Availability Analysis by stating, “To investigate the *feasibility* of a low power radio service, we conducted spectrum availability analyses for sixty communities of various sizes throughout the United States.” *Id.* [emphasis added].

¹⁶¹ *Id.* ¶¶ 42, 44.

¹⁶² *See id.* For example, maintaining existing protection criteria would only allow around 33 LP1000 stations in the sixty markets studied. *See id.* The Commission’s study estimates that 428 LP1000 stations might be available if the Commission eliminates both second and third adjacent channel protections. *See id.*

2. Translators and boosters also must be protected from interference by LP100 stations, if the Commission establishes such a class.

The Commission also asks for comment on how translators and boosters should be treated with respect to LP100 stations due to their proposed secondary status.¹⁶³ The Commission asks whether LP100 stations should be primary with respect to FM translators, and whether LP100 stations should be authorized on an equal basis with translators or whether translators should be “grandfathered” and given protection from LP100 stations.¹⁶⁴

Again, although NAB opposes the establishment of any LPFM service, translators and boosters must be protected against any new LP100 station, even though both translators and the proposed LP100 stations may have the same “secondary” status. Existing translators and boosters already provide service in areas that may not be able to receive any service. Individuals in these areas depend on the service and should not be deprived of service either by an LPFM station being allocated to that same frequency or by a translator being knocked out at the beginning of a chain, resulting in no service down the line.

Again, as shown by NAB’s receiver study, in order to avoid substantial interference to full-power stations and translator stations, the Commission cannot eliminate or reduce the second- or third-adjacent channel protections. In analyzing the Commission’s proposals, we protected translator stations because these stations currently provide service that their listeners depend on. Regardless of the EAS requirements the Commission would establish for LPFM stations, there is no guarantee that any LPFM station would be able to provide the same “lifeline” service provided by full-power stations and translator stations. While NAB’s receiver study demonstrates the unfeasibility of any LPFM proposal, if the Commission decides to go

¹⁶³ Notice ¶ 33.

¹⁶⁴ *Id.*

forward with LPFM, all translators and boosters must be grandfathered against both LP1000 and LP100 stations.

V. THE LPFM *NOTICE* RAISES MANY IMPLEMENTATION ISSUES

A. The Commission Lacks Adequate Enforcement Resources to Properly Regulate the Addition of Hundreds of LPFM Stations.

1. The Commission must consider its ability to carry out enforcement of any rules that are applied to LPFM stations.

The Commission appears to consider enforcement a non-issue in its attempt to create these new classes of service amongst existing full-power stations. The magnitude of the proposal alone should place enforcement at the top of the issues that must be considered and resolved before instituting any new class of service.

In addressing this issue, the Commission merely proposes to apply Section 73.1225 to all classes of LPFM.¹⁶⁵ This rule requires all licensees to make their stations available for inspection by the FCC during business hours or at any time when they are in operation. The Commission also asks for comment on whether LP100 or microradio stations would be subject to Section 74.1203, which requires secondary stations, such as FM translators or boosters, to immediately shut down if they cause any impermissible interference.¹⁶⁶

While NAB believes that both of these proposals must be applied to any broadcast station – whether low power or full power – the fact remains that these enforcement measures have to be *carried out* by the Commission. It is the actual ability of the Commission to enforce these rules that is of concern. Establishing rules for any low power service is merely half the battle.

¹⁶⁵ See Notice ¶ 89.

¹⁶⁶ *Id.* ¶ 90.

Policing and enforcing is the other half. NAB is concerned that the Commission is not adequately equipped to handle the addition of hundreds of new stations.¹⁶⁷

As pointed out in NAB's earlier comments on the Petitions for Rule Making, since 1995, the Commission has drastically scaled back the number of field offices. These field offices are charged with the task of inspecting and investigating complaints. With only 16 field offices for the entire nation, this task could become impossible with the introduction of hundreds of new stations that are operated by individuals who have little or no experience in dealing with FCC regulations and requirements.¹⁶⁸ There is a high risk of unauthorized changes in power, service rule violations or other violations regarding LPFM stations with little or no guarantee that the Commission's resources will be able to handle the increase in activity.

Although the Commission's field offices and the Mass Media Bureau's Enforcement Division are active in making sure that radio stations comply with the FCC's rules, for the most part the rules are enforced through self-regulation. In part, this is the result of a longstanding culture in the broadcasting industry of concern over compliance with the rules, and in part the desire to keep within the rules is reinforced by the incentive to avoid actions which might threaten the FCC license and the large investments in stations.

Neither of these incentives will operate with LPFM stations. The Commission's proposal to prevent any existing broadcasters from becoming LPFM licensees would ensure that operators of LPFM stations will be strangers to the FCC's regulatory environment. And, since the Commission intends to make these stations inexpensive to build and operate, LPFM operators will have only a minimal financial incentive to keep themselves within the confines of the rules.

¹⁶⁷ See *infra* at Part VI.

¹⁶⁸ Comments of NAB in RM-9208, 9242 & 9246, filed April 27, 1998, at 36-37 [hereinafter *NAB Comments in RM-9208*].

This would particularly be the case if the Commission authorizes LP100 or LP10 stations since there would be little investment in those facilities to lose.

Thus, unlike full power broadcasting, where the Commission can effectively regulate with relatively few enforcement resources, the Commission cannot simply assume that LPFM stations will follow the rules without careful monitoring. And since out-of-band emissions or use of excessive power would cause interference to other stations, as well as possibly to air navigation, the Commission must determine how it can provide effective enforcement before it adopts LPFM rules.

Dane Ericksen, a former FCC inspector, has recently pointed out the troubling realities surrounding enforcement actions by the FCC in an article in “The Signal.”¹⁶⁹ Ericksen points out that there is a large difference between shutting down unlicensed broadcasters and policing LPFM stations. Special Engineering Measurement Unit (“EMU”) vehicles and other equipment are needed to determine whether a station is operating outside its authorization, but in fact, very few of these vehicles currently exist or are utilized.¹⁷⁰ The article concludes that the FCC has conducted little enforcement of the FM technical standards in the last few years.¹⁷¹ The potential for chaos exists. The Commission has promised not to institute any service that will cause interference to existing broadcasters. That promise should include interference that will result from rule violations. Thus, the Commission cannot ignore the issue of enforcement as it considers its proposals for LPFM.

¹⁶⁹ Dane E. Ericksen, *Thoughts on LPFM*, THE SIGNAL, May/June 1999, at 8.

¹⁷⁰ *See id.*

¹⁷¹ *See id.*

2. The Commission is the only entity that has the authority to enforce regulations.

The Commission is the only entity that has the authority to regulate the broadcasting industry. This authority cannot be delegated in any manner as suggested by some commenters. In comments filed by the Amherst Alliance, it is suggested that organizations be established that would help regulate the LPFM stations and that LPFM stations would “voluntarily” participate in such organizations.¹⁷² There are two obvious problems with such proposals. First, the Commission proposes to establish the LPFM service in the same band as existing full-power broadcasters. It would make it impossible for two separate entities to resolve disputes and/or enforce regulations when the spectrum is shared. Second, most – if not all – of the LPFM licensees will have little experience with running broadcast stations and operating under a set of regulations. There is no incentive for participation and/or cooperation with any such organization. The FCC’s mandate requires that it is the manager of the spectrum. There cannot be any delegation of this authority.

3. The Commission must consider the enforcement needs regarding pirate broadcasters.

Although the Commission has been careful to distinguish between pirate broadcasting and LPFM, the connection is apparent when considering the enforcement issue. The Commission’s Compliance and Information Bureau has been doing a good job in shutting down unlicensed broadcasters across the nation in the last few years.¹⁷³ However, if in fact the

¹⁷² Comments of the Amherst Alliance in MM Docket 99-25, filed May 7, 1999, ¶ 61.

¹⁷³ Between November 1997 and April 1999, the CIB has “shut down 261 unlicensed ‘pirate’ radio operations, [some of] which . . . were interfering with air traffic control or were otherwise endangering human life.” Federal Communications Commission’s Fiscal Year 2000 Budget Estimates Before the Subcomm. On Commerce, Justice, State and the Judiciary Comm. On Appropriations, 106th Cong. (April 14, 1999) (Statement of William E. Kennard, Chairman, FCC).

Commission authorizes any sort of LPFM service, the enforcement against pirates must continue and is likely to be more burdensome.

It is likely that many of these unlicensed broadcasters would not qualify for any broadcast license, nor would they consider even applying for a license at any time. Part of the thrill of being a “pirate” is the fact that it is illegal to operate without a license. Even assuming that some pirates would apply for an LPFM license, if available, there is a strong chance they would never receive a license because there are a finite number of stations available, no matter what changes are made to the technical rules.¹⁷⁴ The Commission may be faced with a huge backlash from individuals who may not be satisfied with the ultimate outcome of this proceeding. The Commission should not disregard this potential drain on resources as it considers its proposals.¹⁷⁵

4. The Commission’s reduced bandwidth proposal will be ineffective to combat interference.

The Commission’s proposal to apply more restrictive bandwidth limits to LPFM stations in order to reduce interference¹⁷⁶ is untenable because the Commission would be unable to enforce such a requirement. The audio signal level (*i.e.* volume) of an FM broadcast signal is proportional to the bandwidth of the FM transmission. FM broadcasts with narrower bandwidths will sound quieter to the listener when compared with other, wider-bandwidth broadcasts

¹⁷⁴ The Commission must also consider that the serious threat of these offenders shows the need for continuous enforcement and that of the 13,000 requests that it claims have already been made, the majority of these people will not be satisfied under any LPFM allotment scheme. These individuals may decide that unlicensed broadcasting is the only way to go.

¹⁷⁵ It would be particularly unfair to existing broadcasters if the Commission were to authorize hundreds or thousands of new radio signals, and existing stations were required to pay for the additional costs of enforcing the rules through increased regulatory fees. If the Commission restricts LPFM to noncommercial operations – which are exempt from regulatory fees – this unfairness would be ever greater.

¹⁷⁶ Notice ¶ 55.

received by the same radio. This situation would most certainly be unacceptable to most LPFM operators, and they would eventually begin to ignore the Commission's reduced bandwidth requirement in order to transmit signals that sound just as loud to the listener as the full power FM stations on the dial.

The widespread availability of full bandwidth FM transmission equipment, both new and used, would make it easy for LPFM operators to obtain such equipment. And the sheer number of potential LPFM operators, and the fact that proving non-compliance with the bandwidth restriction requires the suspect signal to be measured with specialized equipment, would make it impossible for the Commission to police violators. The Commission's proposal to require that only FCC-certified transmitters be used at LPFM stations would be no help in this regard. Clearly, LPFM operators who would be willing to broadcast signals with wider bandwidths than the Commission's rules allowed would also be willing to use non-certified transmission equipment to accomplish this. For these reasons, a reduced-bandwidth requirement for LPFM stations is not feasible.

B. The Commission Cannot Implement the Proposed Ownership Restrictions.

1. If established, the Commission cannot limit the ownership of LPFM stations to "non-broadcast licensee" owners.

The Commission proposes "not to permit a person or entity with an attributable interest in a full power broadcast station to have any ownership interest in any LPFM (or microradio) station in any market, and to prohibit joint sales agreements, time brokerage agreements, local marketing or management agreements, and similar arrangements between full power broadcasters and low power radio entities."¹⁷⁷ The Commission asks whether this restriction will

¹⁷⁷ Notice ¶ 57.

prevent parties with valuable broadcasting experience from contributing to the success of LPFM or whether the restriction is necessary to keep the LPFM service from being compromised by existing stakeholders.¹⁷⁸ However, the Commission also notes that in light of *Bechtel v. FCC*,¹⁷⁹ an integration requirement would require a “particularly compelling record,” and it declined to impose a local residency requirement for LPFM applicants.¹⁸⁰

One of the Commission’s goals in proposing the LPFM service is to increase the diversity of voices and program services in the radio industry.¹⁸¹ Limiting the proposed LPFM service to “non-broadcast licensees” is necessary, in the Commission’s eyes, because achieving this goal may become impossible if LPFM stations are available to existing broadcasters.¹⁸²

There is no basis for the proposed ownership restrictions. As we have demonstrated, and the Commission’s own 1998 format study also found, multiple ownership of radio stations in the same market *increases* diversity by expanding the number of different program choices available to local listeners. Thus, barring existing local broadcasters from owning LPFM stations – if they are to be authorized – would be counter-productive to the Commission’s stated goal of adding to the diversity of programs available to the public.

Further, preventing LPFM stations from being licensed to, or participating in business arrangements with existing local stations, would prevent LPFM facilities from achieving efficiencies that can be obtained through joint operations. In many communities which are

¹⁷⁸ See Notice ¶ 58.

¹⁷⁹ *Bechtel v. FCC*, 457 F.2d 873 (D.C. Cir. 1992).

¹⁸⁰ See Notice ¶ 62.

¹⁸¹ See *id.* ¶ 57.

¹⁸² See *id.*

served by AM stations limited to daytime operations or restricted night time service, if LPFM were authorized, the public would benefit if current AM stations could use an LPFM facility to provide service at night. As Senator Burns recognized during the debates on the Telecommunications Act, local ownership restrictions “handcuff broadcasters and prevent them from offering the best possible service in our States.”¹⁸³

Even if there were a foundation for the Commission’s conclusion that existing broadcasters should be barred from acquiring LPFM stations in the same market, no rational goal could be served by the proposal to exclude broadcasters licensed in a different market from owning an LPFM station. The *Notice* does not propose to limit LPFM ownership to local residents, and there could be no basis on which the Commission could conclude that a person affiliated with a broadcast station in another market would be less qualified to provide radio service than a person who also lives outside the market but has no relevant experience.

2. The ownership rules established in the Telecommunications Act of 1996 apply to any broadcast service whether or not it existed when the legislation was enacted.

The Commission proposes to limit the number of LPFM stations to one LPFM station per person per community.¹⁸⁴ The Commission seeks comment on whether a national limit of five to ten LPFM stations should be imposed.¹⁸⁵ While it states it is cognizant of the ownership provisions of the Telecommunications Act, the Commission makes a tentative conclusion that the Act “would not apply to a service that did not exist in 1996.”¹⁸⁶ It further believes that

¹⁸³ 141 CONG. REC. S8424 (daily ed. June 15, 1995) (statement of Sen. Burns)

¹⁸⁴ *See Notice* ¶ 57.

¹⁸⁵ *See id.* ¶ 60.

¹⁸⁶ *Id.* ¶ 59.

Congressional intent behind the 1996 Act provisions “does not sufficiently apply to the new classes of service we are contemplating.”¹⁸⁷

The Commission, again, is attempting to distinguish its LPFM proposal from full power stations based on the mere power of the station. The plain language of the statute affords the economic efficiencies to “commercial radio stations” without distinction between power levels. If the Commission authorizes commercial LPFM stations, there does not appear to be any basis to conclude that these stations could not benefit from any efficiencies that may be available under common ownership with other LPFM or full power stations. The legislative history does not provide any evidence that Congress did not expect that any new radio stations – regardless of their power – would not have the same treatment under the Act.

Indeed, it is striking that, while power levels and coverage areas of full power stations vary widely – a fact that was well known to Congress – the radio ownership provisions of the Telecommunications Act treat all commercial stations alike. The Commission’s hypothesis that the different power levels of the stations it now proposes would result in their operating under different ownership regulations cannot be reconciled with Congress’ objectives. Thus, the proposals to limit ownership both locally and nationally of commercial LPFM stations cannot be adopted, and those stations, if they are authorized, would be subject to the same ownership rules as all other commercial radio stations.

3. Adding stations – even LPFM stations – to a market would increase the number of stations for determining the maximum number of stations an entity can own.

Under the FCC’s rules mandated by the Telecommunications Act, a party may “own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same

¹⁸⁷ Notice ¶ 59.

service” in a radio market with 45 or more commercial radio stations.¹⁸⁸ The number of stations an entity can own in a radio market decreases as the markets get smaller (i.e. where there are fewer commercial radio stations).¹⁸⁹ The Commission’s LPFM proposal would increase the number of commercial radio stations in many markets. The ownership rules and the intent of Congress do not distinguish between power levels – only between the commercial or non-commercial status of stations. Thus, the LPFM proposal, from the Commission’s perspective, could have a counter intuitive effect on the radio ownership landscape.

For example, if the Commission establishes some sort of commercial LPFM service, and allots and assigns five new commercial LPFM stations in a market that previously had 43 commercial radio stations, the LPFM stations would “bump” that market into the next bracket of the ownership rules. So, parties who previously may have been precluded from purchasing more stations in a market because they had reached the seven station limit under the rules would be eligible to “own, operate, or control” up to eight stations.

¹⁸⁸ 47 C.F.R. § 73.3555(a)(1)(i) (1998).

¹⁸⁹

- “(ii) In a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);
- (iii) In a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and
- (iv) In a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 or which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.”

§ 73.3555(a)(1)(ii) – (iv).

The Commission appears to be cutting off its nose to spite its face. It cites increased consolidation as a reason to establish the LPFM service, yet in effect, its proposal would allow more consolidation.

4. Granting “amnesty” for known pirate broadcasters rewards illegal behavior.

The Commission has proposed to allow “rehabilitated” pirate broadcasters to be LPFM licensees. The Commission proposed to apply the same character qualifications on LPFM applicants as are applied to full power broadcasters. Thus, the Commission seeks comment on whether unlicensed broadcasters who persisted in unlawful operation after Commission enforcement action should be deemed “per se unqualified.”¹⁹⁰

In most cases, a pirate broadcaster does not make a “mistake” and accidentally broadcast outside of the limits for unlicensed broadcasts. It is a conscious act and demonstrates intent to defy the regulations that are in place to ensure clear service for radio listeners. This type of behavior cannot be tolerated at any time; nor should illegal broadcasters be excused merely because the Commission has proposed to establish an LPFM service.

In draft comments filed as part of an *ex parte* communication, the National Lawyers Guild proposes complete amnesty to all pirate broadcasters because they are “pioneers.”¹⁹¹ The Guild also apparently believes that a preference should be given to pirate broadcasters to reward them for bringing the LPFM issue to the forefront. The Guild asserts that these pirate “pioneers” paved the way for LPFM by asserting their Constitutional right to free speech.

¹⁹⁰ Notice ¶ 67.

¹⁹¹ See Ex Parte submission of the Microradio Empowerment Coalition in MM Docket 99-25 (filed June 28, 1999).

The Commission has consistently kept the issues of pirate broadcasting separate from the LPFM proposals. In fact, the Commission has completely dismissed an alleged premise behind pirate broadcasting – the premise that there is a constitutional right to operate a radio station – as an issue in this proceeding.¹⁹²

Another alleged premise behind pirate broadcasting is that pirates must operate their illegal stations because they are not satisfied with the service provided by existing broadcasters. So, instead of attempting to apply for a license to operate a station legally, these pirates merely began their own station without authorization. They have shown no willingness to abide by any regulations or procedure. Pirate broadcasters should not be afforded any amnesty with regard to their character qualifications as potential applicants for an FCC broadcast license.

C. Service Rules Should Be Required for All Proposed Classes of LPFM Service to Maintain Adequate and Equitable Regulatory Control.

In its quest to distinguish LPFM stations from a typical FM station, the Commission proposed different standards for the application of rules depending on the power of the station. For example, it proposes that the LP1000 class be treated like a full-power FM station when determining public interest programming requirements because of its size and primary status.¹⁹³ Other programming rules that would apply to LP1000 stations are rules “regarding the broadcasting of (1) taped, filmed, or recorded material; (2) lottery information; (3) sponsorship identification; (4) personal attacks; and (5) periodic call sign announcements.”¹⁹⁴ However, the

¹⁹² See Notice n.16. “A number of these commenters assert that the First Amendment guarantees individuals the right to operate a radio station. They raise no arguments or legal analysis, however, to counter our repeated rejection of this premise, and we will not further discuss it in this Notice.” *Id.*

¹⁹³ *Id.* ¶ 70.

¹⁹⁴ Notice ¶ 70.

Commission is “disinclined” to place specific programming requirements on the LP100 class and microradio stations because it expects “the very nature of LP100 and microradio stations will ensure that they serve the public.”¹⁹⁵

Although NAB opposes the establishment of any LPFM service in the first place, it seems contradictory to apply two different standards to what are essentially FM broadcast stations – regardless of their power. LP1000 stations, by their very nature, are not low power stations. There should be no question that any station of that size must play by the same rules as more powerful stations. Furthermore, LP100 and microradio stations are still broadcast stations. The Commission itself noted that this class of station could operate “similar to a full-power station but on a smaller scale.”¹⁹⁶ Thus, a potential LP100 licensee could choose to provide a music format similar to a full-power station, but not be required to provide public interest programming. Other than the power of the station, there is no basis on which to distinguish between the different classes of stations. To listeners, low power stations and full power stations will be indistinguishable. To avoid unintentionally reducing the public’s reliance on local radio service, the Commission should avoid what essentially would be the introduction of amateur services in the midst of the FM band. All FM broadcast stations should therefore be required to follow the same rules.

The Commission also asks for comments on whether low power stations should follow other service rules imposed on full-power broadcasters, such as main studio rules, public file rule and ownership reporting requirements.¹⁹⁷ The Commission states that commenters should

¹⁹⁵ *Id.* ¶ 72.

¹⁹⁶ *Id.* ¶ 11.

¹⁹⁷ *See Notice* ¶ 73.

analyze the characteristics of the service that warrant disparate treatment for the purposes of the rule.¹⁹⁸

NAB submits that there is no reason that any type of low power station should be excluded from the same regulations as a full-power station merely because they operate at a lower power. The Commission itself notes that LP1000 and LP100 stations should abide by the same environmental rules and responsibilities under the National Environmental Protection Act.¹⁹⁹ It proposes this requirement because “LP1000 and LP100 stations would operate at the power levels of some Class A FM stations, and thus the same safety and environmental concerns would seem to apply.”²⁰⁰ If these stations are operating at the power levels of some “full-power” stations, then they should have all the same service rules for broadcast stations applied to them.

Further, there is no reason why LP100 stations should be excluded from EAS system requirements. Again, the Commission envisions the LP100 class could “meet the demand of people who would like to broadcast affordably to communities of moderate size (whether standing alone in rural areas or as part of a larger urban area).”²⁰¹ Presumably, these stations could have significant populations within their listening areas. Thus, those individuals should not be deprived of the critical information provided by the EAS particularly because it will not be clear to those listeners that they will not receive the emergency warnings that they have come to expect from radio stations.

¹⁹⁸ See *id.*

¹⁹⁹ See *id.* ¶ 74.

²⁰⁰ *Id.*

²⁰¹ *Id.* ¶ 30.

On one hand, the Commission appears to propose that low power stations should be treated differently because of their size, but then admits that in many cases these stations are not different from other classes of FM stations. In the eyes (and ears) of listeners, LPFM stations would be virtually indistinguishable from full-power stations. Separate regulatory schemes would confuse the public. In order to provide consistent, efficient and effective regulatory control, the Commission should not distinguish between different classes of stations based on the power of the station. An FM station is an FM station is an FM station – no matter how you slice it.

D. The Commission lacks ability to guarantee LPFM stations will be allocated to the entities that it has promised.

The Commission, in creating the LPFM proposal, establishes that its goals are “to address unmet needs for community-orientated radio broadcasting, foster opportunities for new radio broadcast ownership, and promote additional diversity in radio voices and program services.”²⁰² It believes that LPFM stations could provide “a low-cost means of serving urban communities and neighborhoods, as well as populations living in smaller rural towns and communities.”²⁰³ Unfortunately, the Commission’s beliefs and reality do not coincide.

1. Mutually exclusive commercial licenses must be auctioned.

As NAB pointed out in our comments on the original *Petitions for Rule Making* in this docket, the Balanced Budget Act of 1997 directs the Commission to conduct auctions for

²⁰² Notice ¶ 1.

²⁰³ *Id.*

mutually exclusive commercial broadcast licenses.²⁰⁴ This section would apply to any LPFM service.

Assuming that LPFM is established, the Commission tentatively concludes that it would have to conduct auctions for mutually exclusive commercial LPFM applications.²⁰⁵ The Commission cites to its decision in its *Auctions Order* that would apply the Balanced Budget Act of 1997 provisions regarding broadcast auctions to secondary services that were not mentioned.²⁰⁶ NAB believes the Commission's conclusions are correct. LPFM would be subject to auctions.

The legislative intent is very clear in this area. Where there are mutually exclusive applications for commercial broadcast licenses, the plain language of the statute requires that "the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding."²⁰⁷ There are exemptions from the auction requirement in the statute, but there is no intent to exempt certain radio stations based on their power level. Thus, any mutually exclusive application for a commercial LP1000 station would be subject to auction. Likewise, based on the Commission's own conclusions regarding secondary radio services, mutually exclusive commercial LP100 applications would be subject to auctions as well. Furthermore, there can be no distinction made with regard to whether the auction requirement applies to "newly created services," as contemplated by the Commission.²⁰⁸

²⁰⁴ See *NAB Comments in RM-9208* at 35 (citing Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002, 111 Stat. 25 at 258 (1997)).

²⁰⁵ See *Notice* ¶ 103.

²⁰⁶ See *id.* ¶ 105.

²⁰⁷ Balanced Budget Act of 1997 § 3002(a)(1), codified at 47 U.S.C.A. § 309(j) (1999).

²⁰⁸ *Notice* ¶ 105.

Contrary to how the Commission or LPFM proponents may define it, the LPFM proposal is not a new phenomenon. These are proposed broadcast stations using the FM band. They should be treated as broadcast stations under the existing Commission rules. The Commission cannot exclude the proposed LPFM service from the Balanced Budget Act merely based on the power at which they may operate. It would not be in line with the intent of Congress when it enacted the auction requirement.

2. Virtually no LPFM allocations are available in urban markets and numerous allocations exist in rural markets without modifying any current restrictions.

As shown by the Commission's own analysis, there are very few allocations available in the urban markets for either LP1000s or LP100s because the FM band is already very congested.²⁰⁹ According to the FCC, no matter what is done to the protection criteria, there are virtually no LPFM stations "available" in New York City, Los Angeles or Chicago. Additionally, as NAB has shown, the Commission cannot eliminate second or third adjacent channel protections; thus, the numbers drop significantly in all of the studied markets. The Commission's intent to provide this service for "urban neighborhoods and communities" cannot be a reality because the laws of physics prevent it from happening.

Furthermore, there already may be many channels already allocated or available for allocation in rural markets. There is nothing preventing individuals from applying for an unassigned allocation when a window is available or from petitioning the Commission to allocate a channel to their community, if one is available. The process may take a little longer, and the station may be more expensive to build, but the belief that LPFM service as proposed is needed so that individuals in rural markets can have stations is unfounded. Obviously, the

²⁰⁹ See Notice Appendix D.

demand for the rural markets is not as great as the Commission believes, otherwise there would not be channels that are unassigned, unallocated and virtually available.

VI. THE COMMISSION SHOULD NOT ESTABLISH A MICRORADIO SERVICE.

In its *Notice*, the Commission seeks comment on whether to establish a third class of LPFM stations,²¹⁰ i.e. “microradio” stations that would operate on a secondary basis at 10 watts or less.²¹¹ Admittedly, these microradio stations would provide very limited service coverage, approximately one to two miles.²¹² The Commission envisions this type of service for individuals or groups “with very limited means to construct a broadcast facility and permit them to reach listeners within the confines of a very localized setting.”²¹³ Beyond believing that these stations should be licensed and have a FCC transmitter certification requirement,²¹⁴ the FCC suggests little to no other regulation for this class. While the Commission may think this type of service would pose fewer problems than the LP1000 or LP100 stations, NAB believes a microradio class creates virtually the same problems, but on a potentially larger scale.

A. A Microradio Class Would Lead to Inefficient Use of the Spectrum, Degradation of the FM Band and Implementation Issues for IBOC.

The issue of inefficient use of the spectrum applies to a microradio service as well as the other proposed classes. The original Class D FM stations operated at the maximum “microradio” level of 10 watts. As noted, *supra*, the Commission reasonably determined that this size of station is inefficient as compared to the service that is provided by full-power

²¹⁰ *Notice* ¶ 1.

²¹¹ *Id.* ¶ 34, 36.

²¹² *Id.* ¶ 34.

²¹³ *Id.*

²¹⁴ *Id.*

stations.²¹⁵ This policy has been in place for over 20 years and the Commission has not set forth any justification that warrants a reversal.

In addition, as with any LPFM service, dropping in stations creates pockets of service surrounded by interference. In a mobile listening society, microradio stations pose a significant threat. Microradio stations would not be available to most listeners in cars due to the small service areas, but would provide pockets of interference to existing stations – including their mobile listeners. Congestion on the FM band leads to scanning nightmares where traveling between these small service areas would not allow radios to lock onto signals properly. The effect of having such a service would be the degradation of the FM band due to the congestion and an overall decrease in the public's use of FM.

Finally, a microradio class, although secondary, could have an adverse impact on the transition to digital. There is no way to know at this time what effect any LPFM service would have on the transition to IBOC DAB. The Commission should not establish an LPFM service – including microradio stations – without first establishing and implementing IBOC DAB. As pointed out below, the FCC likely lacks the resources to monitor and prevent microradio stations from interfering with existing stations – this includes the transition to digital. Although, in theory, the Commission would have the ability to remove microradio stations if necessary for IBOC DAB, the reality is likely to be that it will be difficult for the Commission to remove stations once they begin operation.

²¹⁵ See section III. F., *supra* at 48.

B. A Microradio Class Would Require More Resources to Implement and Enforce.

The Commission appears to believe that fewer FCC resources would be needed for a microradio class than for any other proposed LPFM class. Logic would dictate that such a service would require more resources and regulation in order to ensure that existing services are not harmed.

First, the Commission would have to devise a way to implement and allocate such a service. Its experience with LPTV should be a harbinger of the potential backlog.²¹⁶ Although it attempts to address these issues in the *Notice*, the Commission should not be overly optimistic that it has the capabilities and resources to accept applications, allot stations, assign licenses and also enforce the regulations against these small microstations.

In the area of enforcement, the Commission suggests that microradio stations should have transmitter certification requirements, but no required operating schedule, no EAS requirements and less programming and service rules to follow.²¹⁷ While transmitter certification would be a “must,” the other suggestions threaten to exacerbate the problems associated with a low power service in general.

As witnessed by the pirate radio problem, it is an easy task to purchase transmitter equipment and start a radio station cheaply. There is little to stop an individual from purchasing equipment and to start broadcasting before applying for any license – whether any LPFM service is established. As noted earlier in these comments, although the Commission has been doing a good job of shutting down these illegal broadcasters, establishing any LPFM service – and in

²¹⁶ The Commission itself notes that it had difficulties with implementing LPTV, where a backlog of over 37,000 applications accumulated in the first four years of implementation. *See Notice* ¶ 93.

²¹⁷ *See id.* ¶¶ 35, 72 –73, 76, 87.

particular a microradio service – would substantially add to the enforcement problems. There would be little ability for the Commission to monitor microradio stations and enforce their power limits without months of delay and potential judicial administrative proceedings. The operators of microradio stations would be individuals with little to no broadcast experience and little investment in the station. Thus, they would not have a lot to lose. The Commission cannot expect to have the resources to control these stations if it were to establish a microradio service.

C. A Microradio Service Would Not Result in More Service to the Public.

In declining to suggest imposing programming regulations, the Commission states that it believes that “the very nature” of microradio stations will “ensure they serve the public.”²¹⁸ As NAB pointed out earlier in these Comments, SPR’s report indicates that due to the nature of the low power radio proposal, these stations would be less likely to provide quality programming to any audience they may be able to reach.²¹⁹

Further, without requiring at least some “operating schedule” requirements, there is no guarantee or way to know that these stations are operating and providing any type of service to anyone. A microradio class would be the most amateur of all proposed LPFM classes. Many of the interested individuals likely are “hobbyists” who, without required operating times, could simply choose to operate a few hours a week. The Commission stated it could “revisit” the issue of wasted spectrum if microradio stations were licensed.²²⁰ However, it would have a hard time determining if spectrum is being wasted and a tougher time attempting to get those individuals off the air so that it could license someone else to that spectrum.

²¹⁸ Notice ¶ 72.

²¹⁹ SPR REPORT at 19.

²²⁰ Notice ¶ 77.

As a potential further disservice to the public, the Commission declines to suggest that microradio stations would have EAS requirements. The Commission notes that microstations will have “extremely small coverage areas and probably very small audiences, as well as limited resources.”²²¹ Thus, the Commission does not see EAS as an important, vital service requirement for those small audiences of the microradio station, nor for those full power station listeners who may be in one of the “pockets” of interference resulting from the microradio station. Microstations still would be broadcast stations in the public’s view, and EAS should be required to ensure that all listeners are able to receive EAS alerts when necessary.

There is no rational policy basis to implement a microradio service merely for more voices if there is no guarantee that the resulting service would benefit the public. The Commission must actually consider its ability to implement and enforce rules for microradio, as well as the ability and intent of the potential microradio licensees to provide service. Once that is done, it is clear a microradio class is not a realistic service to implement.

²²¹ Notice ¶ 87.

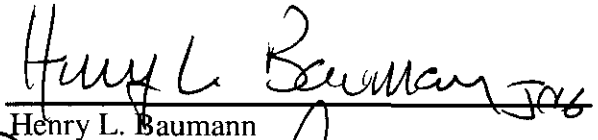
VII. CONCLUSION

For the reasons stated herein, the Commission must not establish the proposed LPFM service.

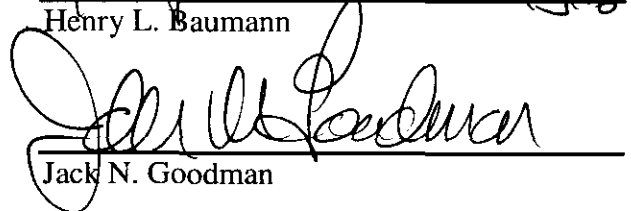
Respectfully Submitted,

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A handwritten signature in cursive script, appearing to read "Henry L. Baumann", written over a horizontal line.

Henry L. Baumann

A handwritten signature in cursive script, appearing to read "Jack N. Goodman", written over a horizontal line.

Jack N. Goodman

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